United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-1322

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1322

In the Matter of the GRAND JURY SUBPOENA of
FRED VIGORITO, ALEXANDER NOCE
and DIEGO ASARO,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

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32 CASE PRESS INC., 421 HUDSON ST., N.Y.—ORegon 5-4540

April 22nd, 1974

Clerk
Court of Appeals
Federal Courthouse
Foley Square
New York, New York

RE: In the Matter of the GRAND JURY SUBPOENA of FRED VIGORITO, ALEXANDER NOCE and DIEGO ASARO.

DOCKET NO. 74-1322

Honorable Sirs:

I represent the appellees in connection with the above-captioned matter. In examining the Brief, I realize that I have set forth old Rule 41 (e) of the Rules of Criminal Procedure. In fact, I intended to cite Rule 41 (e) as it now reads.

I would ask that you consider my Brief amended to include Rule 41 (e) as it now reads rather than as set forth in the Brief.

Respectfully yours,

GUSTAVE H. NEWMAN

GHN:ga
CC: Hon. Fred Barlow
AUSA

I N D E X

TABLE OF CITATIONS

UNITED STATES COURT OF APPEALS

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Docket No. 74-1322

In the Matter of the GRAND JURY SUBPOENA of

FRED VIGORITO, ALEXANDER NOCE and DIEGO ASARO,

Appellees.

BRIEF FOR THE APPELLEES

STATEMENT OF THE CASE

The appellees received notice that several of their conversations were overheard by use of an electronic device. They thereafter were summoned to give voice exemplars. The device used for obtaining the exemplars was initially a Grand Jury Subpoena. They were not summoned before the Grand Jury nor did they appear before the Grand Jury nor were they asked any questions nor was immunity conferred upon them. They furnished the exemplars as requested. Thereafter, no further proceedings were undertaken against the appellees. They were not subpoenaed before a Grand Jury nor was anything further done in reference to them. They, thereafter, brought a proceeding jointly under Title 18, U.S. Code, Section 2510 et. seq. which was amplified on oral argument without objection to include a proceeding under 41 (e) of the Federal Rules of Criminal Procedure. Pursuant thereto, the District Court in the person

of the Honorable John Dooling ordered that copies of the electronic interception orders and underlying affidavits be furnished counsel under certain Court-imposed safeguards as a predicate for counsel, if he saw fit, to bring a motion to controvert. When the appellant refused to comply with the Court order to deliver the electronic interception orders and affidavits, the Court ordered that they not proceed against these appellees until they comply with the Court order. The appellants then brought on an application to reargue and this motion was denied.

POINT I

THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED

Rule 41 e of the Rules of Criminal Procedure provides as follows:

> "Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its fact, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissable in evidence at any hearing or trial."

The Rule, by its very terms, provides also for suppression as relief ancillary to the return of property. The Rule also makes it clear by its very language that it provides for a pre-criminal proceeding motion. Since it specifically states that if a motion is made post information or indictment or information, it is treated as a Rule in motion to suppress. See also DiBella v. U.S., 82 S.Ct. 654.

The explanatory note that follows the 1972 amendment of the Rule establishes two criteria: (1) the person is entitled to lawful possession, and (2) the seizure was illegal. The note goes on to state that the first subdivision is read to mean that if the material seized is per se contraband, then

there cannot be a return viz narcotics. This, of course, is not the case at bar.

The moving parties below were "aggrieved parties" within the meaning of the statute. Leeper v. U.S., 446 F2d 281 Cert. Denied 92 S.Ct. 695; Katz v. U.S., 88 S.Ct. 507.

The application of the moving parties below had viability under Rule 41 e.

The appellees availed themselves of the remedy under 41 e and brought this proceeding. The proceeding is equivalent to a civil complaint. Lapides v. U.S., 215 F2d 253.

It may be brought prior to indictment irrespective of whether Grand Jury proceedings are pending or are even in actual progress or even if an information was filed and no indictment filed. U.S. v. Foley, 283 F2d 582 (2nd Cir : 1920); Grant v. U.S., 282 F2d 165; DiBella v. U.S. (supra).

The appellees also have separate status under the provisions of Title 18, U.S. Code, Section 2510 et seq. Under Section 2510 (11) aggrieved person is defined as any person who is a party to an intercepted conversation. The notices served upon these appellees establishes this. Section 2518 (10a) allows any aggrieved person in any "trial", hearing or proceeding before any court etc., to move to suppress. The appellees brought a proceeding for return of property, clearly a proceeding within the Section; they are aggrieved persons by the statutory definition; and this has, in fact, been conceded. See page 43 of the minutes of argument. Thus, the application of the appellees has separate viability under the provisions of Title 18, Section 2510 et seq. The motion to suppress can be part of the

return of property proceeding. Boyd v. U.S., 116 U.S. 616 (1958); Plymouth v. Pennsylvania, 380 U.S. 693; U.S. v. Physic, 75 F2d 338 (2nd Cir : 1949).

The legislative comments that follow the enactment of Section 2510 et seq. as reflected in the report of the 90th Congress, 2nd Session, 1968, at page 2515, recognizes suppression in Federal and State proceedings not limited to criminal proceedings and further recognizes suppression as necessary and proper tools to protect privacy and as a guarantee against unlawful interception of communications. The intent is clearly spelled out in the legislative notes to allow suppression in any adversary hearing. It also indicates that suppression is offered as a remedy in the way that was used in U.S. v. Calandra, 94 S.Ct. 613, 623 (1974). Thus, as a "remedy" it should be applied to remedy the wrong if any in intercepting the appellees conversations.

It is respectfully submitted that the argument that the appellant offers to seek a reversal of the District Court's decision mistakes the nature of the proceeding below and the peculiar facts attendant thereto. For example, they begin with a point heading which states that Grand Jury witnesses have no right, etc. The facts are clear within both statements of fact. These appellees are not witnesses. There is no process outstanding as to them. They appeared and gave voice exemplars without appearing before any Grand Jury. In short, the statement of their status as Grand Jury witnesses is incorrect. Therefore, all of the argument that follows and the citations relied upon to bolster that argument in Point I of Appellant's Brief is inapplicable.

For example, much reliance is initially placed upon the decision in U.S. v. Calandra (supra). However, as the appellant's brief is quick to recognize that statutory provisions such as those involved in Title 18, Section 2510, et seq are excepted from that decision. See footnote 11, page 623. The reliance on Justice White's concurring opinion in Gelbard v. U.S., 92 S.Ct. 2357 (1972) is equally misplaced. That opinion dealt with the dilemma of a Grand Jury witness seeking to delay the Grand Jury proceeding while he litigated the interception. The appellees here are not within the class of persons involved; they are not Grand Jury witnesses; they do not seek to delay the Grand Jury. The appellees herein seek the return of property.

The appellants place their greatest reliance upon the recent decision In The Matter of Alphonse Persico, Docket No. 74-1101 (2nd Cir : February 19, 1974) (no citation presently available). This case dealt with the problem envisioned by Justice White. It is also inapplicable at bar for the reasons previously cited in relation to Gelbard (supra). Beyond all of this, however, the origins of Gelbard and Persico should be examined before they are applied at bar. Both of the cases dealt with defenses asserted to contempt cases and both arose on behalf of Grand Jury witnesses who were granted immunity. The case at bar as previously stated does not deal (a) with witnesses before a Grand Jury, (b) who are defending against any proceeding ie., contempt; and (c) beyond all else these appellees have never appeared before a Grand

Jury and been asked questions, asserted their privilege or been granted immunity. The differences in the facts clearly highlight the inapplicability of the precepts of those two cases to this one. If more of a distinction is required, it must be noted that reading Judge Waterman's opinion in Persico (supra) one seems to be struck by his concern for interfering with the Grand Jury, by interrupting it to hold a full blown suppression hearing. That is not what is sought at bar. The appellees are not witnesses, are under no process. They are not holding back their appearances contingent on the outcome of this hearing. They say, let the Grand Jury proceed. The attempt by the appellant to employ the spectre of the delay of the Grand Jury investigation by resorting to Justice White's query in Gelbard (supra) and by the Persico (supra) decision is not genuine. They intercepted the conversations of appellees in April, May and June of 1973. They gave exemplars in November of 1973. Certainly, the evidence could have and should have been presented. The delay, if any, cannot be thrust at the feet of the appellees. It might even be said that in Persico (supra), Judge Waterman recognized the validity of proceedings such as this one under 41 (e). The support for this contention comes from his interpretation of the applicability of Section 2515, the exclusionary section of Title 18. He reasoned that this applies only when in another proceeding, suppression has been granted, then the tapes involved cannot be used before a Grand Jury.

The appellant brought delay of the Grand Jury proceeding involved, if any, upon themselves when they failed to comply

with the Judge's order to furnish the underlying documents. The Judge only ordered them not to proceed, as a penalty for not obeying his order. In other words as "coercive" not as a punitive measure. The proceeding here is truly a proceeding in another context. See: In the Matter of Alphonse Persico (supra). The Grand Jury investigation will continue full tilt upon submission under the Court directed safeguards of the orders and affidavits. It might even be suggested the tapes could be put into evidence while a suppression hearing is going on. The only penalty being if indeed there was an indictment against these appellees and the motion to suppress had been granted, the Grand Jury minutes as to them would have to be sufficient without the intercepted material to be valid. In short, the spectre of delaying the investigation that was raised over Persico (supra) has no place or validity in this case. The case of Cali v. U.S., 464 F2d 475 (1st Cir : 1972) is not applicable. The Cali case (supra) also deals with a witness before a Grand Jury who sought to delay the proceedings while he tested the validity of a wire tap. This was attempted even prior to Cali's being involved in any contempt proceeding. For all of the reasons previously advanced in reference to Persico (supra) and Justice White's statement in Gelbard, Cali (supra) is not applicable at bar.

The second point of appellant's brief attempts to take electronic interception out of the purview of 41 (e) based on dicta contained in Bova v. U.S., 460 F2d 404 (2nd Cir : 1972). That case dealt with appealability of a denial after hearing of a motion to suppress electronic interception brought by

witnesses subpoenaed to testify at a trial. It should be noticed parathentically, that the District Court in that case gave the witnesses a full hearing on the validity of the "electronic interception", apparently including examination of the orders and underlying affidavits and then denied the suppression on the merits. The witnesses sought to appeal that determination. A motion was made to dismiss the appeal and it was granted. It was held not applicable because the motion was inextricably interwoven to an ongoing criminal prosecution in reliance on DiBella (supra). The material relied upon by the appellant to bolster their contention might be classified as judicial thinking aloud. The Court posed a question whether telephone conversations could be property in the ordinary meaning. Certainly, the Court recognized that in applying the Fourth Amendment. For example, we have gotten away from the standard concept of tangible property thus allowing suppression of conversations under the Amendment. In addition, we might ask in the same vein of thinking aloud, whether the key to 41 (e) is really property. Certainly, no one could recognize a "proprietary" interest in the "ordinary meaning of language" in speaking of heroin, an unlicensed gun, counterfeit money, etc. Yet, certainly no one would deny that an aggrieved party can utilize the provisions of 41 (e) for a pre-criminal proceeding -- motion for the return of same (without ever expecting to have it physically returned to them), and to suppress same. In short, we suggest Judge Friendly did not in the language quoted by the appellant

rule that a motion under 41 (e) could not be made relative to electronically intercepted conversation. It might be suggested if that were the intent it certainly would have been reflected in the 1972 Amendment of 41 (e) which follows by four years Section 2510 et seq and was enacted after a preview of some of the problems attendant to 2510 et seq.

We would also suggest that the method employed vis-a-vis motion picture films seized prior to an adversary hearing might be employed to effectuate a return of electronically intercepted material. Thus a copy of the tapes could be made and not used, and the original returned to counsel to be held by him subject to Court order should the suppression be reversed. The information garnered by officers who listened cannot be returned anymore than unlawful observations of any kind. The only protection as to that is the integrity of the law enforcement authorities. The transcripts made from the tapes could be returned to counsel subject to the same Court order as in the case of the tapes themselves. If any question arises as to that, then a copy of the tape and transcript can be delivered, sealed to the Court to be opened and utilized by the prosecution if the suppression is reversed.

We respectfully suggest that the old common-law concepts and talismanic words such as "property" were not intended to be construed and applied to defeat a statute created by Congress in both its very language and in its explanatory notes to balance the competing interests and protect the public.*

*Footnote: 41 (e) and Title 18, Sec. 2510 et seq.

Judge Friendly, in the dicta relied upon by the appellant in the Bova case (supra) implied that the magic word "property" was not used in the dissenting opinions in Olmstead v. U.S., 277 U.S. 438. We respectfully suggest that the word "property" is not to be interpreted either as a key to this case or so rigidly as to include electronically intercepted conversations. Nevertheless, Judge Brandeis, in his dissent in Olmstead (supra) at page 475, all but equated the telephone conversation with tangible property when he stated:

> "...The mail is a public service furnished by the government. The telephone is a public service furnished by its authority. There is, in essence, no difference between the sealed letter and the private telephone message. As Judge Rudkin said below:
>
> > 'True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed; but these are distinctions without a difference.'"

It might also be suggested that there is language in Justice Brandeis' dissent in Olmstead (supra) in which he all but refers to telephone conversations as tangible property when he stated at page 487:

> "...The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it. Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard and taken down."

Beyond all of this, it is quite clear that all the dissents in Olmstead (supra) which become the majority view ultimately

and is reflected in Title 18, U.S. Code, Section 2510 et seq clearly decries restrictive linquistic interpretation. We submit all of Judge Brandeis' dissent and most of Judge Butler's dissent to support our conviction that the attempt to attach such magic to the word "property" has no validity. However, we will just set forth some limited excerpts from both of these distinguished opinions to prove our point at page 472:

> "We must never forget," said Mr. Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L.Ed. 579, "that it is a Constitution we are expounding." Since then this court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the fathers could not have dreamed...
>
> "We have likewise held that general limitations on the powers of government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the states from meeting modern conditions by regulations which "a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive."...
>
> "Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world."

Judge Butler stated on pages 487 and 488:

> "This court has always construed the Constitution in the light of the principles upon which it was founded. The direct operation of literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words. That construction is consonant with sound reason and in full accord with the course of decisions since McCulloch v. Maryland. That is the principle directly applied in the Boyd Case."

These are just some of the insights contained in the dissent which reject the narrow construction sought by the appellant.

Perhaps the ultimate admission of bankruptcy on the part of the appellant is a closing suggestion in their brief that the District Court's order be reversed because the appellees did not use words in their application that they were entitled to lawful possession.

It seems almost too frivilous to comment upon, but suffice it to say that the retention of counsel, the bringing of the civil proceeding for return of property is sufficient allegation, if one be necessary, that these appellees claim lawful possession to the words recorded.

CONCLUSION

THE ORDER OF THE DISTRICT

COURT SHOULD BE AFFIRMED.

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